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No. 79-923

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALAN L. STEIN, As Secretary of the Business and Transportation Agency of the State of California,
APPELLANT

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, A California corporation, etc., and FEDERAL HOME LOAN BANK BOARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE FEDERAL HOME LOAN BANK BOARD TO AFFIRM

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The Solicitor General, on behalf of the Federal Home Loan Bank Board, moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1-10) is reported at 604 F.2d 1256. The opinion of the district court (J.S. App. 16-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. A notice of appeal to this Court was filed on November 19, 1979 (J.S. App. 80-81) and the jurisdictional statement was filed on December 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

QUESTION PRESENTED

Whether, as applied to federal savings and loan associations, the regulatory provisions of the California Housing Financial Discrimination Act of 1977 are preempted by the comprehensive regulatory authority of the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933.

STATEMENT

1. The Federal Home Loan Bank Board ("Board") is an independent agency of the United States. 12 U.S.C. 1437(b). It has authority under Section 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1464, to charter, examine, supervise and regulate federal savings and loan associations.

In December 1977 the Secretary of the Business and Transportation Agency of California ("Secretary") sent a letter to all federal savings and loan associations located in California. The Secretary informed the federally-chartered associations that, under the California Housing Financial Discrimination Act of 1977, Cal. Health and Safety Code § 35800 *et seq.* (West. Supp. 1979), they were required to comply with the state's "anti-redlining" law[1] and must post a specific notice in a conspicuous location at their respective places of business and distribute a similar notice to all loan applicants (J.S. App. 20). On February 2, 1978, after being apprised of the Secretary's actions, the Board issued an opinion that federal law barred any attempt by officers of the State of California to apply the state law to federal savings and loan associations.

2. The Conference of Federal Savings and Loan Associations and certain individual associations then instituted this action in federal district court, seeking a declaration that federal law preempted application of the state "anti-redlining" law to federally-chartered loan associations (J.S. App. 20).[2] The district court granted the requested relief, concluding that "[t]he Bank Board's exercise of its plenary regulatory power granted by Congress under HOLA

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[1] The practice of "redlining" involves lender discrimination against applicants seeking loans in particular geographical areas with the effect, *inter alia*, of reducing the availability of family housing, impairing property values and perpetuating racial and economic segregation in the affected area. See J.S. App. 5, 20; J.S. 4.

[2] The Board was named as a nominal defendant but supported plaintiffs' request for declaratory relief.

preempts legislation by the State of California which attempts to subject Federal savings and loan associations in California to state regulation and discipline in the area of anti-redlining practices" (J.S. App. 22).[3]

The court of appeals affirmed. The court concluded that the substantive nondiscrimination requirements of the state law were not at issue in this case because respondents have challenged only the state's procedural, regulatory requirements—such as information posting and administrative monitoring and resolution of consumer complaints (J.S. App. 9). The court held that these state regulatory procedures were preempted because "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control" (J.S. App. 9). The court declined to consider whether the substantive provisions of the state law could be enforced against the federal associations (J.S. App. 9, 10), holding only that nondiscrimination regulations promulgated by the Bank Board under HOLA "wholly pre-empt the field of regulatory control over these associations" (J.S. App. 10).

[3] On February 28, 1978, the Secretary filed an action against an individual federal savings and loan association in state superior court for declaratory relief and civil penalties for failure to comply with the regulatory provisions of the state "anti-redlining" law (J.S. App. 20-21). The Bank Board moved the federal district court for an injunction against the state enforcement proceedings. The district court ruled that an injunction "would appear to be unnecessary" in light of its disposition of this suit (J.S. App. 14).

ARGUMENT

Since 1972, the Board has barred discriminatory lending practices by federal savings and loan associations (12 C.F.R. 528, 531.8). Since 1978, the Board has amplified that prohibition by promulgating comprehensive anti-redlining regulations applicable to all federal associations. See 43 Fed. Reg. 22332 (1978).[4] There is thus no question in this case that federal savings and loan associations are prohibited from discrimination and redlining in their lending practices. The question in this case is whether California—and, by extension, every other state or local jurisdiction—can superimpose upon the federal regulatory scheme an additional comprehensive set of procedures to achieve nondiscrimination goals.[5] The court of appeals correctly determined that the result-

[4] These regulations were adopted pursuant to the HOLA, not pursuant to the Equal Credit Opportunity Act, 15 U.S.C. 1691, *et seq.* ("ECOA"), as amicus N.A.A.C.P. Legal Defense Fund suggests (Br. 1-5). The Board's 1972 regulation, which preceded enactment of the state's legislation by five years, expressly notes that the Board relied on Section 5(a) of the HOLA, not ECOA, as the source of its authority to issue the regulations. 37 Fed. Reg. 8437 (1972). Similarly the Board's 1978 amendments to its fair lending regulations state that the amendments are promulgated pursuant to authority delegated to the Board under the HOLA. 43 Fed. Reg. 22332 (1978). In adopting 12 C.F.R. 545.6a, effective March 14, 1979, the Board once again stated that Section 5 of the HOLA is the basis for its fair lending requirements for federal associations. 44 Fed. Reg. 15479 (1979).

[5] The state may, of course, apply its nondiscrimination regulations to state-chartered lenders that are not federal savings and loan associations.

ing maze of state, local and federal rules would conflict with the Board's statutory mandate to provide a uniform national standard for the lending practices of federal savings and loan associations, including comprehensive prohibitions against discrimination and redlining. The court thus properly held that "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control" (J.S. App. 9) and that nothing in any other federal statute, including Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* ("ECOA") and the Home Mortgage Disclosure Act, 12 U.S.C. 2801 *et seq.* ("HMDA"), requires a different result.

1. As this Court has observed on two occasions, the purpose of the HOLA is to empower the Board to create an exclusive uniform national regulatory standard to govern the operation of federal savings and loan associations and thus protect "federal associations from being forced into the state regulatory mold." *First Federal Savings & Loan Association* v. *Massachusetts Tax Commission*, 437 U.S. 255, 258 n.3 (1978).[6] See also *Hopkins Savings Association*

[6] *Massachusetts Tax Commission* involved an interpretation of Section 5(h) of the HOLA, 12 U.S.C. 1464(h), which grants authority to the states to impose nondiscriminatory taxes on federal associations. The Court held that such a tax is not invalid because it recognizes that state and federal regulations may differ. "There is no reason to believe that § 5(h) was intended to force state and federal regulation into the same mold." 437 U.S. at 258.

v. *Cleary*, 296 U.S. 315, 333 (1935). Accordingly, every court of appeals to have considered the question has concluded that the HOLA and the regulations promulgated by the Board constitute a comprehensive federal regulatory scheme that preempts all state regulation of the lending practices of federal savings and loan associations.[7] These decisions are

[7] See, *e.g.*, *First Federal Savings Loan Ass'n of Boston* v. *Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Kupiec* v. *Republic Federal Savings & Loan Ass'n*, 512 F.2d 147, 150 (7th Cir. 1975); *Meyers* v. *Beverly Hills Federal Savings & Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974). See also *Rettig* v. *Arlington Heights Federal Savings & Loan Ass'n*, 405 F. Supp. 819, 823 (N.D. Ill. 1975); *City Federal Savings and Loan Ass'n* v. *Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1974); *Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 377 F. Supp. 11, 17 (N.D. Ill. 1974); *Elwert* v. *Pacific First Federal Savings and Loan Ass'n*, 138 F. Supp. 395, 399-400 (D. Or. 1956); *California* v. *Coast Federal Savings & Loan Ass'n*, 98 F. Supp. 311, 318-319 (S.D. Cal. 1951); *Washington Federal Savings and Loan Ass'n. of Miami* v. *Balaban*, 281 So. 2d 15, 17 (Fla. 1973); *Kaski* v. *First Federal Savings and Loan Ass'n of Madison*, 240 N.W. 2d 367 (Wis. 1976).

Appellant suggests (J.S. 30 n.21) that *Durnin* v. *Allentown Federal Savings and Loan Association*, 218 F. Supp. 716 (E.D. Pa. 1963), held that state law may apply to the practices of federal associations. But *Durnin* stands only for the proposition that, in the absence of an express Board regulation, general common law governs a member's right of access to an association's membership list. *Id.* at 719. See also *Murphy* v. *Colonial Federal Savings & Loan Association*, 388 F.2d 609, 611 (2d Cir. 1967), holding that federal common law may be applied to fill gaps in Board regulations concerning the right of access to federal associations' membership lists. These cases are thus consistent with the conclusion that federal law preempts state regulation of federal associations, particularly where—as here—the state law in-

especially applicable here, where state regulatory procedures would intrude into an area governed expressly by comprehensive Board regulations.

Appellant's principal contention (J.S. 14-24) is that the ordinary rule that the HOLA preempts all state regulation of federal savings and loan association is inapplicable in this case because, in enacting Title VIII of the Civil Rights Act of 1968, the ECOA, and the HMDA, Congress specifically authorized the states to regulate discrimination in lending by federal savings and loan associations. This contention is incorrect and does not warrant plenary consideration by this Court.

a. Appellant argues (J.S. 16-20) that the language and legislative history of the Equal Credit Opportunity Act authorizes state regulation of credit discrimination and indicates that Congress did not intend that HOLA preempt state regulation in this limited area. But, in enacting ECOA, Congress expressly provided that compliance with its nondiscrimination requirements is to be enforced by the Board. 15 U.S.C. 1691c(a)(2). By conferring this enforcement authority on the Board, Congress reaffirmed its intent to preclude state regulation of federal savings and loan associations.

The savings clause in 15 U.S.C. 1691d(f) provides that ECOA "does not annul, alter, or affect, or exempt

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trudes into an area governed expressly by comprehensive Board regulations.

The remaining cases cited by appellants (J.S. 24-31) do not involve the HOLA or Board regulations and are therefore inapposite.

any person * * * from complying with the laws of any state with respect to credit discrimination * * *." The legislative history reflects that the savings clause does not affirmatively authorize state regulation of federal associations, but merely protects the state's ability to regulate credit institutions previously subject to state control.[8] In enacting ECOA, C[illegible]ss rejected a Senate proposal that would have "prevent[ed] any federal supervisory agency from exempting federally chartered financial institutions from complying with any State law or regulation which protects borrowers at those institutions * * *." H.R. Rep. No. 93-1429, 93d Cong., 2d Sess. 4 (1974). By preserving the Board's jurisdiction over federal savings and loan associations, Congress ensured that, while ECOA left the states free to apply their laws to persons already subject to state authority, the

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[8] Appellant argues (J.S. 16) that HOLA cannot preempt state regulation unless the Board of Governors of the Federal Reserve System first determines that there is an inconsistency between state and federal law pursuant to 15 U.S.C. 1691d(f). But the provision to which appellant refers is wholly inapplicable to this case. 15 U.S.C. 1691d(f) refers only to an application by a *state* for an exemption from ECOA for certain types of credit transactions. See 12 C.F.R. 202.12 (Truth-in-Lending); Supplement I to regulation B (see 12 C.F.R. at 489). The exemptions granted by the Federal Reserve Board have explicitly excepted transactions in which a federally-chartered institution is a creditor because federally-chartered institutions remain subject to the enforcement authority of federal agencies. See, *e.g.*, Supplement I to Regulation B of ECOA n.4; Supplement III to Regulation Z.

states could not extend their jurisdiction to regulate federal associations.

b. Appellant's reliance on Title VIII of the Civil Rights Act of 1968 is similarly misplaced. That Act does not authorize state credit regulation of federal associations; it merely provides that Title VIII itself does not "invalidate or limit any law of a State * * *." 42 U.S.C. 3615. The Board does not contend that Title VIII invalidates or limits any state law. The Board relies on the HOLA, not Title VIII or ECOA, as the basis for federal preemption. See pages 5-8 and note 4, *supra*.

c. The history of the Home Mortgage Disclosure Act supports the conclusion that the Board retains exclusive regulatory authority over the credit practices of federal savings and loan associations. The HMDA was enacted to require disclosure of mortgage data by financial institutions making federally-related mortgage loans. While the Act does not declare the practices of "redlining" to be unlawful, it requires the publication of mortgage data to discourage the practice of redlining by making it visible. A comparison of draft versions of the HMDA with the statute as finally approved, together with relevant legislative history, indicates that Congress contemplated that the redlining practices of federally-chartered institutions would be governed exclusively by federal law.

Section 306 of the original House and Senate versions of the Act (H.R. 10024, 94th Cong., 1st Sess.

(1975); S. 1281, 94th Cong., 1st Sess. (1975)) provided that it would not exempt "any person" in a state from complying with state laws on disclosure and recordkeeping unless state law was inconsistent with the HMDA's requirements. The apparent intent of this draft provision was to include both state and federally-chartered financial institutions within the definition of a "person" subject to state requirements. See H.R. Rep. No. 94-561, 94th Cong., 1st Sess. 13 (1975). Congressman Stephens, however, offered amendments to ensure that the HMDA would not alter the Board's exclusive regulatory authority over federal savings and loan associations. As Congressman Stephens explained (121 Cong. Rec. 34564 (1975)):

> The difficulty, so far as the language of the present statute is concerned, is that it is not clear whether State regulation will be adhered to or whether Federal regulation will be adhered to in a savings and loan company if there is a difference between the State regulation and the Federal regulation.
>
> So far as these federally controlled savings and loan associations are concerned, they have always been regulated by the Federal Home Loan Bank Board. The Federal Home Loan Bank Board in considering the language of the statute, says it is not clear whether that is to be continued or not. This is what the Board has asked to be done, and this is why I offered the amendment.

The amendment proposed by Congressman Stephens was adopted as Section 306 of the Act, 12 U.S.C.

2805, which provides in part as follows (emphasis supplied):

> (a) This chapter does not annul, alter, or affect, or exempt any *State chartered* depository institution subject to the provisions of this chapter from complying with the laws of any State or subdivision thereof with respect to public disclosure and recordkeeping by depository institutions, except to the extent that those laws are inconsistent with any provision of this chapter * * *.
>
> (b) The Board may by regulation exempt from the requirements of this chapter any *State chartered* depository institution within any State or subdivision thereof, if it determines that, under the law of such State or subdivision, that institution is subject to requirements substantially similar to those imposed under this chapter * * *.

Congress adopted the Stephens amendment precisely for the purpose of ensuring that federally-chartered institutions need not comply with state law in the area of mortgage disclosure. See S. Conf. Rep. No. 94-553, 94th Cong., 1st Sess. 9-10 (1975); *Glenn Ellyn Savings and Loan Ass'n* v. *Tsoumas*, 71 Ill. 2d 493, 377 N.E. 2d 1, cert. denied, 439 U.S. 927 (1978).

Despite this clear expression of congressional intent, appellant maintains that Congress intended exclusive federal regulation to apply only to the disclosure of geographical mortgage lending statistics and that there was no intent to preempt the states

from regulating any other aspect of "redlining" discrimination in lending. But Representative Stephens made clear that federal preemption should apply to all aspects of credit regulation of federal associations; the fact that Section 306 is limited to the disclosure of geographical mortgage lending statistics reflects only the fact that that was the only subject addressed in the HMDA. It was unnecessary for Congress, in enacting the HMDA, to state that the Board has exclusive jurisdiction over all other aspects of credit regulation for federal associations because Congress provided that exclusive authority to the Board more than thirty years ago in enacting the HOLA. See *Fry* v. *United States*, 421 U.S. 542, 546 (1975).

In sum, contrary to appellant's contentions, recent federal statutes and consumer protection laws do not establish that Congress expressly authorized the states to regulate mortgage lending discrimination and "redlining" by federal savings and loan associations. Efforts to create an exception to the Board's exclusive regulatory and supervisory authority under HOLA have repeatedly been rejected by Congress, which has reaffirmed its intention to retain a single, federal regulatory authority to supervise the credit activities of federally-chartered savings and loan associations.

2. The Board does not contend, as appellant suggests (J.S. 29-31), that federal preemption under HOLA applies to matters of purely local concern, such as zoning for property held by federal associations or employee health and safety regulations. The exclusive

authority conferred on the Board by the HOLA concerns only the credit practices and business affairs of federal associations, including their internal organization and external commercial relations.

This Court has concluded on two occasions that, in enacting HOLA, Congress intended to establish a uniform scheme of federal regulation of federal associations. Moreover, appellant and the amici have recognized that the Board has exercised its exclusive authority in the precise context of prohibiting "redlining" discrimination and they do not question the adequacy of the Board's regulations or the effectiveness of the Board's enforcement efforts under the regulations. This case thus fails to present any novel or unsettled question of federal law and does not warrant plenary review.

CONCLUSION

The judgment of the court of appeals should be affirmed.[9]

Respectfully submitted.

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[9] Because the court of appeals expressed no disagreement with the Secretary's interpretation of the state statute's regulatory procedures as applicable to federal associations, we believe that court's decision is properly interpreted as holding the state statute as so applied invalid under the Supremacy Clause—and that affirmance by this Court is therefore the appropriate disposition. If, however, this Court were to conclude that the court of appeals interpreted the state statute as inapplicable, in light of the pervasive federal regulatory scheme, then the appropriate disposition would be to dismiss the appeal and, treating the papers whereon the appeal was taken as a petition for a writ of certiorari (under 28 U.S.C. 2103), to deny certiorari for the reasons stated in this Motion to Affirm.

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